SUPREME COURT, U.S.
FILED
1972

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1015

GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District.

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INDEX

	Page
Opinion below	5
Jurisdiction	5
Questions presented	6
Constitutional and statutory provisions involved	7
Statement of the case	10
Reasons for granting writ	12
Conclusion	16
Appendix	18

CITATIONS

Cases:

Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, L.Ed. 4

Douglas v. People, 83 S.Ct. 814, U.S. 353, 9 L.Ed.2d 811, rehearing denied 83 S. Ct. 1288, 373 U.S. 905, 10 L.Ed.2d 200

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Kansas C.S.R.Co. v. Guardian Trust Co., 281 U.S. 1, 50 S.Ct. 194, 74 L.Ed. 659

Reynolds v. Cochran, 365 U.S. 525,81 S.Ct. 723, 5 L.Ed.2d 754, 1961

Mills v. Electric Auto-Lite Co., 396 U. S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593, 606, 1970

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Universal Oil Products Co. v. Root Ref. Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447

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Day v. Woodworth, 13 How. 363, 1 L.Ed. 613;
Glade v. Walgreen Co., 46 F.Supp. 396 (1942, D.C. Ill) Aff'd 135 F.2d 590 (C.A. 7th)
Kelly v. Bowman, 104 F.Supp, 973 (D.C. Ill. 1952)
Schroeder v. Busenhart, 80 Ill.App.2d, 4 431, 225 N.E.2d 702;
U.S. v. Taylor, 11 F.470, C.C. Kan., 1882
U.S. v. The Nuestra Senora de Regla, 17 Wall. 29, 21 L.Ed. 596

Miscellaneous:
United States Constitution, Amendment XIV
United States Constitution, Amendment VI
28 U.S.C. Sec. 1257
Ill.Rev.Stat., Chap. 110, Sec. 41
Ill.Rev.Stat., Chap. 110, Sec. 57 (2) and (3)
Circuit Court of Cook County, Ill. Rule 6.1(b)

IN THE
SUPREME COURT OF THE UNITED STATES
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NO. _____

GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,

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v.

J. C. BUSENHART, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SECOND DIVISION

The petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, First District, Second Division, entered in this proceeding on May 20, 1971, in favor of defendants below, respondents herein: J. C. Busenhart, R. A. Schiller, Frank Jantac, Margaret Marble, Clayton P. Brown, Mrs. K. G. Gunter, Mrs. June Brownell, Robert C. Nordli, William L. Cox, Deanne R. Tubbs, Kenneth C. Carroll, Edward C. Nofret, L. R. Murphy, David C. Hanna, William A. Krampert, Robert Wood, Raymond Busse, Arthur Busse, George L. Busse, Arthur Skelton, Wesley Landmier, and Glen R. Grunewald, for the use and

benefit of the Board of Education, School District 57, Cook County, Illinois.

OPINION BELOW

The opinion of the Illinois Court of Appeals, reported as ___Ill.App.2d.___ 272 N.E.2d 750 (1971), appears in the Appendix hereto. No opinion was rendered by the Illinois Supreme Court in denying Petition for Leave to Appeal, and in denying Petition for Reconsideration.

JURISDICTION

The judgment of the Appellate Court of the State of Illinois was entered on May 20, 1971. No petition for rehearing was filed. A timely petition for leave to appeal was filed in the Supreme Court of Illinois, and this petition was denied. A timely motion for reconsideration was denied on November 9, 1971, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257.

QUESTIONS PRESENTED

1. Whether the Appellate Court of Illinois decision contravened the 14th and 6th Amendments to the United States Constitution when, under an Illinois statute permitting the granting of attorney's fees against a party for "allegations...made without reasonable cause and not in good faith and found to be untrue," the court awarded attorney's fees in favor of respondents:

(a) For attorney's fees on appeal, after the trial court originally found the complaint pleadings not filed without reasonable cause, in good faith, and not to be untrue;

(b) For attorney's fees of an attempted intervenor, who was not a party to the action, and whose petition for leave to intervene had been denied by the trial court;

(c) For attorney's fees for multiple attorneys, with overlapping and duplicative efforts; and

(d) For attorney's fees on appeal, in response to an amendment made in the trial court more than thirty days after the mandate of the appellate court had been filed.

2. Whether the Appellate Court of Illinois decision contravened the 14th and 6th Amendments to the United States Constitution in denying the petitioners' motion for continuation, under circumstances of a new attorney having been

retained in the case only a few days prior and whether Rule 6.1(b) of the Circuit Court of Cook County specifically stating that a continuance shall not be granted upon ground of substitution of attorney violates said United States constitutional provisions.

3. Whether the Illinois Court summary judgment procedures under the circumstances of this case violate the 14th and 6th Amendments rights to equal protection and due process, and particularly the right to trial by jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Illinois Revised Statutes, Chapter 110, Section 41:

"Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleadings, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial."

Illinois Revised Statutes, Chapter 110, Section 57(2) and (3):

"(2) defendant. A defendant may, at any time, move without or without supporting affidavits for a summary judgment or decree in his favor as to all or part of the relief sought against him."

"(3) The opposite party may prior to or at the time of the hearing on the motion file counter-affidavits. The judgment or decree sought shall be rendered forthwith if the pleadings,

depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law...

Rules of the Circuit Court of Cook County, 6.1(b):

"(b) Addition or substitution of attorneys - A continuance shall not be granted upon the ground of substitution or addition of attorneys."

STATEMENT OF THE CASE

The petitioners herein, plaintiffs below, filed a complaint against the respondents herein, and other defendants, charging a conspiracy to take certain real estate of the petitioners through the process of condemnation allegedly for school purposes. The petitioners further alleged in that complaint that certain of the defendants wrongfully failed on an appeal of that case, unrelated to this appeal, to raise the issue of "fee simple determinable" under the rule of Kelly v. Bowman, 104 F.Supp. 973 (D.C. Ill. 1952).

The trial court found in favor of the defendants, respondents herein, in a summary judgment proceeding, but specifically denied defendants' application for attorneys' fees under Sec. 41 of the Illinois Civil Practice Act for pleading "untrue statements." On appeal, the Appellate Court of Illinois, First District, affirmed the summary judgment for defendants, but reversed the trial court's refusal to grant Sec. 41 attorneys' fees. (Schroeder v. Busenhart, 80 Ill.App.2d 431, 225 N.E.2d 702.)

At the hearing on Sec. 41 attorneys' fees in the trial court, leave was granted the respondents to file instanter an amendment requesting attorneys' fees incurred not only at the original trial of the case, but also on appeal.

On September 18, 1968, the trial court entered an order granting the petitioners' attorney leave to withdraw, and directing that the case be heard on October

15, 1968, from which date no further continuance would be granted. On that date, the petitioners appeared with a substitute attorney, who presented a written motion for continuance; the motion stated that the attorney, Mr. Stewart, had been contacted by the petitioners on September 18, and on September 20, had retained him to examine the facts, "in this and several other matters," on which he had rendered a written report with recommendations on October 9. The motion further stated that the petitioners had retained Mr. Stewart "to represent them in this matter" on October 13, and the attorney being in trial on another matter on October 14 was unable to prepare for the hearing on the October 15 date.

The motion for continuance was denied and the hearing was held on Sec. 41 attorney's fees on October 15 and 16. The order found in favor of the respondent named individuals, "for the use and benefit of the Board of Education, School District 57, Cook County, Illinois;" the School District, however, had previously petitioned for leave to intervene, which petition had been denied by the trial court at the time the complaint was dismissed by summary judgment. In addition the court awarded the total sum of $16,168.46 for the use and benefit of the respondent Board of Education, which included attorneys' fee claims of two separate groups of attorneys.

The trial court denied post-trial motions, and a direct appeal was taken to the Illinois Supreme Court (No. 42136); this was transferred to the Illinois Appellate Court, No. 54611, with the

decision in favor of the respondents printed in the appendix hereto. The Illinois Supreme Court denied a petition for leave to appeal on September 29, 1971, and denied a motion for reconsideration of the order denying petition for leave to appeal on November 9, 1971.

REASONS FOR GRANTING THE WRIT

The Illinois Appellate Court has decided an important question of Federal substantive law not heretofore determined by this court, or in a way, probably not in accord with applicable decisions of this Court, and such a matter should be settled by this Court.

1. *Whether the Appellate Court of Illinois decision contravened the 14th and 6th Amendments to the United States Constitution when, under an Illinois statute permitting the granting of attorney's fees against a party for "allegations...made without reasonable cause and not in good faith and found to be untrue," the court awarded attorney's fees in favor of respondents:*

(a) For attorney's fees on appeal, after the trial court originally found the complaint pleadings not filed without reasonable cause, in good faith, and not to be untrue;

(b) For attorney's fees of an attempted intervenor, who was not a party to the action, and whose petition for leave to intervene had been denied by the trial court;

(c) For attorney's fees for multiple attorneys, with overlapping and duplicative efforts; and

(d) For attorney's fees on appeal, in response to an amendment made in the trial court more than thirty days after the mandate of the appellate court had been filed.

A vital issue ripe for resolution is the relationship of State civil penalties through attorney's fees, as these conflict with the constitutional requirements of equal protection and due process.

Perhaps the most basic of all human rights in a free society is the right of access to the courtroom; the effective use of legal counsel in the jury process unhindered by fear of crushing financial penalties if the case is lost.

In contrast to the English practice, it has long been the American rule that:

"Since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a law suit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel." (Fleischmann v. Maier Brewing Co., 386 U.S. 714, 87 S. Ct. 1404, 18 L.Ed.2d 475 at 478, 1967)

Thus, since the earliest days of our court system, it has been the policy of this Court against penalizing the losing

party with attorney's fees, for the precise purpose of keeping access to the courts free and untrammeled. (Arcambel v. Wiseman, 3 Dall. 306, 1 L.Ed. 613, 1796; Day v. Woodworth, 13 How. 363, 1 L.Ed. 613; U.S. v. The Nuestra Senora de Regla, 17 Wall. 29, 21 L.Ed. 596.)

Lower federal courts have interpreted this to deny them the power to use attorney's fees as a penalty, even in vexatious cases, without further authority. Glade v. Walgreen Co., 46 F.Supp. 396 (1942, D.C. Ill.) Aff'd 135 F.2d 590 (C.A. 7th)

With this general rule that attorney's fees are not recoverable against the losing party, there are exceptions, particularly based on the "common fund" or those circumstances where a plaintiff maintains a suit in behalf of a class which substantially benefits a large group of other parties who were not otherwise bearing the fees expenses. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593, 606 1970. However, this Court has held that attorney's fees would not be awarded against a plaintiff, even in a malicious prosecution proceeding. Stewart v. Sonneborn, 98 U.S. 187, 25 L.Ed. 116

Particularly where the effect of attorney's fees, once denied in the trial court, are granted after appeal, this fails at the critical appellate level to "ensure that access is not denied to those of moderate means." Farmer v. Arabian American Oil Co., 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d at 255-257, 1964, concurring opinion of Mr. Justice Goldberg.

Thus, this Court has refused requests for attorney's fees on appeal (Kansas C.S.R. Co. v. Guardian Trust Co., 281 U.S. 1, 50 S.Ct. 194, 74 L.Ed 659), and in a slightly different context has concluded:

"The equal protection clause requires that once a state establishes avenues of appellate review, those avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed. 2d 440, at 442, 1969).

"This clause does not exist if the kind of an appeal a man enjoys depends on the amount of money he has." Douglas v. People, 83 S.Ct. 814, U.S. 353, 9 L.Ed. 2d 811, rehearing denied 83 S.Ct. 1288, 373 U.S. 905, 10 L.Ed2d 200.

This Court has concluded that parties volunteering to involve themselves in a lawsuit are allowed neither their attorney's fees nor their expenses. (Universal Oil Products Co. v. Root Ref. Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447.)

2. Whether the Appellate Court of Illinois decision contravened the 14th and 6th Amendments to the United States Constitution in denying the petitioners' motion for continuation, under circumstances of a new attorney having been retained in the case only a few days prior and whether Rule 6.1(b) of the Circuit Court of Cook County specifically stating that a continuance shall not be granted upon ground of substitution of attorney violates said United States constitutional provisions.

Equally basic to due process and equal protection constitutional safeguards is the right for counsel to have sufficient time to prepare adequately for his client's case. This Court has repeatedly held that:

"If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense." (Howell v. Alabama, 287 U.S. 45, at 69, 53 S.Ct. 55, 77 L.Ed. 158.)

Accordingly, this Court has held failure to grant a continuance to obtain an attorney as reversible error. (Reynolds v. Cochran, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed. 2d 754, 1961; Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed 4.)

Thus it would appear that the Cook County Circuit Court rule No. 6.1(b) is in conflict with these decisions of

this Court.

3. Whether the Illinois Court summary judgment procedures under the circumstances of this case violate the 14th and 6th Amendments rights to equal protection and due process, and particularly the right to trial by jury.

Just as the directed verdict is not a substitute for a jury trial (U.S. v. Taylor, 11 F. 470, C.C. Kan. 1882), so the summary judgment procedure cannot substitute for the due process and equal protection right of a contested matter, including the issue of attorney's fees, to be heard by a jury.

CONCLUSION

The overwhelming effect of the proceedings below is to deprive the petitioners of the effective use of the courts, as is their right under the Federal Constitution. But the significance of this type of practice, for every litigant, is to put a drastic financial penalty upon the possibility of taking a case to appeal and failing, which in turn has its greatest effect upon the indigent, the individual of limited resources, and the individual without substantial corporate or other instutional financial resources.

The case herein reached the curious result that the filing of the complaint in the trial court was not unreasonable, but the appeal was found to be unreasonable and subjected the entire proceed-

ing to attorney's fees of the adverse parties. Added to this were the fees of an officious intermeddler, and overlapping and duplicative efforts of multiple attorneys. These overwhelming financial burdens on the appellant litigants raise this case to profound constitutional dimensions, and for these reasons a writ of certiorari should issue to review the judgment and opinion of the Illinois Appellate Court.

Respectfully submitted,

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February 7, 1972

APPENDIX

No. 54611 (Ill.App.2d ; 272N.E.2d 750,1971.)

GERALD A. SCHROEDER and CLARA E. SCHROEDER, Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	)	
J. C. BUSENHART, et al., Defendants-Appellees,	)	
and.	)	HONORABLE ABRAHAM
LATTOF MOTOR SALES, INC., Defendant.	)	BRUSSELL, PRESIDING.

MR. JUSTICE McGLOON DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment of $16,168.46 made to defendants for attorneys' fees and expenses pursuant to defendants' petition filed under Section 41 of the Civil Practice Act. A direct appeal was taken to the Illinois Supreme Court by plaintiffs. The Supreme Court directed that this court hear the appeal. On oral argument in this court, plaintiffs' counsel agreed that the constitutional issues raised by them in their briefs were foreclosed by the action of the Supreme Court in transferring the case to this court.

We affirm.

This case is yet another in this "apparently unending litigation." Schroeder

v. Busenhart, 80 Ill. App. 2d 431, 441, 225 N.E. 2d 702. The history of the litigation is discussed at great length at pages 434-8 of 80 Ill. App. 2d, 431, and 703-5 of 225 N.E. 2d 702. At that time this court decided, and it is res judicata in this appeal, that the plaintiffs had filed a suit without reasonable cause, not in good faith and untrue, so as to subject the plaintiffs to the provisions of Section 41 of the Civil Practice Act which states in its entirety:

> Untrue statements. Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleadings, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial. Ill. Rev. Stat. (1963) Ch. 110, Sec. 41.

Pursuant to the mandate of this Court, the matter was returned to the Circuit Court of Cook County for a hearing to determine the amount of attorneys' fees and expenses to be assessed against the plaintiffs.

The cause was remanded back to the trial court, and the mandate was forwarded by the Clerk of the Appellate Court to the Clerk of the Circuit Court of Cook County on October 20, 1967.

The record is unclear as to what happened to that mandate, and a new mandate

issued on March 13 and was filed with the Clerk of the Circuit Court on March 15, 1968. On April 3, 1968, the cause on motion of the defendants was reinstated and the matter assigned for hearing.

On April 24, 1968, leave was granted to defendants to file an amendment to their Section 41 petition to tax the expenses and attorneys' fees incurred by reason of the appeal. On September 18, 1968, the trial court allowed the then attorney for plaintiffs to withdraw, and set the hearing for October 15, 1968. The order further stated the hearing would "proceed whether or not plaintiffs herein have by that time retained counsel to represent them with respect to said hearing."

On October 15, 1968, plaintiffs' new counsel filed a verified motion for a continuance. This motion was denied. Plaintiffs' new counsel made an oral motion to strike the Section 41 amendment tendered by defendants in the trial court stating that the said amendment was a new complaint.

A review of the record discloses that plaintiffs' new attorney was consulted September 20, 1968, and retained to look into the case. On October 9, 1968, counsel rendered a report to plaintiffs. On October 13, 1968, he was retained to handle the case and appear at the hearing of October 15, 1968.

Between September 28, 1968, and October 14, 1968, plaintiffs were unable to

give their new counsel a working file of the case. In the verified motion for a continuance it was alleged that counsel wanted copies of all the pleadings filed after the return of the mandate. After a full hearing on the motion for a continuance, the judge denied the motion based on his order of September 18, 1968.

At the hearing on October 15 and 16, 1968, plaintiffs moved to strike the amendment of April 24, 1968, calling for taxing the expenses and attorneys' fees incurred on the appeal in addition to taxing the expenses and attorneys' fees incurred in the trial court. The trial court reserved ruling on that motion and proceeded to hear evidence on the issues. On November 22, 1968, judgment was entered for defendant taxing expenses and attorneys' fees to plaintiffs of $16,168.46.

Plaintiffs argue that the court arbitrarily abused its discretion in denying their motion for a continuance on October 15. Supreme Court Rule 231(f) provides that "no motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay." Ill. Rev. Stat. (1967) Ch. 110A, Sec. 231(f).

The rules of the Circuit Court of Cook County state specifically that a continuance shall not be granted upon the ground of substitution of attorney. Rule 6.1(b).

Defendants are correct in their position when they assert that a request for a continuance made on the day a hearing was to start was not such an arbitrary act on the part of the trial court as counsel for plaintiffs was the third attorney in a four-month period to appear in this cause, and the trial court had advised all parties a month earlier that no further continuances would be granted. The harm which plaintiffs seek to prevent in the cases which they cite is the denial of an opportunity for effective representation by counsel. Here counsel distinguished himself by the vigorous and thorough manner in which he conducted plaintiffs' case. We do not believe that the trial court's action in denying further continuances in these circumstances in any way prejudiced the plaintiffs.

The plaintiffs further claim that the court improperly and arbitrarily entered a judgment against them without having disposed of their oral motion to strike the Section 41 amendment. The court at the time the motion was made reserved ruling thereon.

Plaintiffs also raise a question of lack of jurisdiction on the part of the trial court to allow an amendment to the Section 41 petition.

In Standard Statistics Co. v. Davis, 317 Ill. App. 377, 45 N.E. 2d 1005 (1942) the Appellate Court reversed where a motion had not been ruled upon. The court found that the motion was well

taken and had to be granted. In the instant case it would have been better had the court ruled upon the oral motion. Indeed, sub silentio it was denied, and the court treated it as if it had been denied and properly so. We do not see how the plaintiffs were prejudiced in any way. Moreover, defendants properly contend that in this case the plaintiffs never renewed their oral motion to strike the amendment, and thus waived it. Trimmer v. Franklin Life Insurance Co., 319 Ill. App. 520. 49 N.E. 2d 642 (1943).

The next issue raised by plaintiffs is that the defendants did not ask for those expenses and attorneys' fees associated with perfecting the appeal reported in 80 Ill. App. 2d 431, 225 N.E. 2d 702 until more than 30 days had elapsed after the mandate had issued from the Appellate Court. This contention is not well taken for the following reasons: 1) The objection was not timely raised: it was not raised at the time the amendment was filed, nor at any time until orally raised at the hearing October 15. 2) The 30-day period would run from the date of reinstatement, not the date the mandate issues. See Lind v. Spannuth, 8 Ill. App. 2d 442, 131 N.E. 2d 796 (1956). In this instance the amendment was offered within 21 days after reinstatement of the case. 3) The 30-day rule does not apply where the case continues but only where jurisdiction ceases following a final judgment.

Rule 41 is silent as to whether expenses and attorneys' fees on appeal may be taxed to a party. However, it is now

clear that such expenses and attorneys' fees are properly taxed under Rule 41. In Manchester Insurance and Indemnity Co. v. Strom, 122 Ill. App. 2d 183, 258 N.E. 2d 150 (1970), the court found that where the initial action was without any basis and in bad faith, that:

> ...the appeal is a needless extension of a baseless lawsuit. By this appeal, it appears that the plaintiff has remained stubbornly litigious and has caused the defendants and third parties additional unnecessary expenses for which they are entitled to reimbursement under the provisions of Section 41 of the Civil Practice Act.
>
> We believe that the amount of reasonable attorneys' fees incurred in connection with the appeal should be determined at a full hearing and that such determination should be made by the trial court, upon petition and answer or other appropriate pleadings, and after the evidence has been received on this issue. 122 Ill. App. 2d at 190, 258 N.E. 2d 155.

Manchester decided that reasonable attorneys' fees and expenses are included under the Section 41 penalty even through the Appellate proceedings. In the Manchester decision the Appellate Court stated that the amount of reasonable attorneys' fees should be determined at a full hearing and that such determination should be made by the trial court, upon petition and answer or other appropriate pleadings. Therefore, the question raised by plaintiffs that the trial court

lacked jurisdiction to allow an amendment to the Section 41 petition is not well taken.

The plaintiffs contend that the trial court improperly assessed attorneys' fees and expenses incurred in connection with preparing the petition for intervention filed by the School Board. Many of the individual defendants had been sued because of their position as trustees of the School Board. We are not going to dissociate the action of the School Board from that of its members in this case. It was proper to file such a petition in attempting to defend the frivolous lawsuit brought by plaintiffs.

Plaintiffs ask that the award not include fees for more than one attorney as the language of Section 41 is in the singular. This assertion is in conflict with An Act to revise the law in relation to the construction of the statutes (Ill. Rev. Stat. (1967) Ch. 131, Sec. 1.03) which states that "words importing the singular number may extend and be applied to several persons or things...."

In The absence of any showing of duplication of work on the part of attorneys, whether they were in the same lawfirm or in a firm not associated, the fact of nonassociation in a lawfirm will not prevent counsel whose work is otherwise compensable from being included in the costs of a Section 41 award. Plaintiffs' argument

that the award was an abuse of discretion was made with no reasons whatsoever given in support of their position.

JUDGMENT AFFIRMED

McNAMARA, P.J.; and DEMPSEY, J., concur.

Supreme Court, U.S.
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No. 71-1015

In the

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OCTOBER TERM, 1971

GERALD A. SCHROEDER and
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Questions presented	1
Statement of the case	2
The condemnation trial and the first appeal	3
Proceedings on remand	3
The second appeal	3
Further proceedings in the Trial Court	3
The "Taxpayers' suit"	4
The third and fourth appeals	4
The federal action	5
The case at bar	6
Argument	9
I. No federal constitutional questions are presented	9
II. There was no denial of federal constitutional rights in denying a continuance to the petitioners	11
III. Petitioners were not denied federal constitutional rights by the Illinois court summary judgment procedures"	12
Conclusion	13

Table Of Cases And Authorities

Cases

Bailey v. Anderson, 326 U.S. 203 (1945) 10, 13

Bell v. School Board, 321 F.2d 494 (4th Cir. 196[illegible] 9

Manchester Ins. & Ind. Co. v. [illegible]rom, 122 Ill. 2d 183 (2nd Dist. 1970) 9

PAGE

Michel v. Louisiana, 350 U.S. 91 (1955) 13

People ex rel. White v. Busenhart, 29 Ill. 2d 156 (1963) 2, 4, 5

Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951) 9

Schroeder v. Busenhart, 80 Ill. App. 2d 431 (1st Dist. 1967), cert. denied 390 U.S. 947 (1968) 2, 7, 8, 12

Schroeder v. Busenhart, 272 N.E. 2d 750 (Ill. 1st Dist. 1971) 2, 7, 8, 10

Schroeder v. Illinois, 354 F.2d 561 (7th. Cir. 1965), cert. denied, 384 U.S. 972 (1966) 2, 6

Trustees of Schools v. Schroeder, 23 Ill. 2d 74 (1961) .. 2, 3

Trustees of Schools v. Schroeder, 25 Ill. 2d 289 (1962) 2, 3

Tanssig v. Wellington Fund, Inc., 187 F. Supp. 179 (D. Del. 1960); affirmed, 313 U.S. 806 (1963); cert. denied, 374 U.S. 806 (1963) 9

Ungar v. Sarafite, 376 U.S. 575 (1964) 11

STATUTES

Ill. Rev. Stat., 1959, Ch. 47, § 14 3

Ill. Rev. Stat., 1961, Ch. 113, § 44 4

Section 41, Illinois Civil Practice Act (Ill. Rev. Stat., 1963, Ch. 110, § 41) 7

Illinois Supreme Court Rule 231(f) (Ill. Rev. Stat., 1969, Ch. 110A, § 231(f)) 11

Rules of the Circuit Court of Cook County, Rule 6.1(b) 11

OTHER AUTHORITIES

6 Moore, Federal Practice, ¶54.77[2] (2d ed. 1971) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1015

GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States.

Respondents, who are past and present members of the Trustees of Schools, the Board of Education and the school administration in Mount Prospect, Illinois, submit this brief in opposition to the petition for certiorari.

QUESTIONS PRESENTED

1. Were petitioners denied constitutional rights by the assessment against them of attorneys' fees incurred by respondents as a result of petitioners' appeal of the dismissal of their original baseless and vexatious suit, or by any of

the procedural rules applied by the Illinois Courts to Section 41 of the Illinois Civil Practice Act?

2. Were petitioners denied constitutional rights by the denial of a further motion for continuance made on the day trial was to begin after repeated continuances had been granted earlier?

3. Was some "summary judgment procedure" employed which resulted in a denial of constitutional rights?

STATEMENT OF THE CASE

This case is one of almost innumerable attempts petitioners have made since 1961 to relitigate various aspects of the school district's taking under the power of eminent domain of a certain parcel of land in Mount Prospect, Illinois, for use as a school site. The history of this litigation is reported in *Trustees of Schools* v. *Schroeder*, 23 Ill.2d 74 (1961); *Trustees of Schools* v. *Schroeder*, 25 Ill.2d 289 (1962); *People ex rel. White* v. *Busenhart*, 29 Ill.2d 156 (1963) (deciding consolidated appeals in two cases); *Schroeder* v. *Illinois*, 354 F.2d 561 (7th Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); and in the opinions of the Illinois Appellate Court in this case, *Schroeder* v. *Busenhart*, 80 Ill. App. 2d 431 (1st Dist. 1967), *cert. denied*, 390 U.S. 947 (1968); and *Schroeder* v. *Busenhart*, 272 N.E. 2d 750 (Ill. 1st Dist. 1971). The following is a summary of that history.

The Condemnation Trial and the First Appeal.

The condemnation action giving rise to these proceedings was commenced in the Circuit Court of Cook County, Illinois on November 6, 1959 against petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, who then owned the land in question. After the Schroeders' amended tra-

verse attacking the trial court's jurisdiction was denied, the case was tried, and a jury awarded them $267,083.33. The circuit court granted the school trustees' motion for new trial, from which order the Schroeders appealed to the Illinois Supreme Court. That court reversed in *Trustees of Schools* v. *Schroeder*, 23 Ill.2d 74 (1961) and directed entry of the judgment upon the verdict.

Proceedings on Remand.

On remand, the circuit court entered judgment on the verdict, and the school trustees deposited the amount of the judgment, which with interest and costs totalled $280,956.10, with the county treasurer pursuant to Illinois statute (Ill. Rev. Stat., 1959, Ch. 47, §14). The circuit court thereupon entered an order finding fee-simple title in the school trustees and putting them in possession pursuant to provision therefor in the judgment order and as provided by Illinois law.

The Second Appeal.

The Schroeders again appealed, challenging the validity of the taking. They urged that their land could not be taken because an Illinois statute forbade the school district from taking land within forty rods of the owner's dwelling. The Illinois Supreme Court held that the statute did not have that effect as to the land in question, and affirmed in May, 1962. *Trustees of Schools* v. *Schroeder*, 25 Ill.2d 289 (1962).

Further Proceedings in the Trial Court.

While a petition for rehearing was pending in the Illinois Supreme Court, the Schroeders, after being evicted by the sheriff went back into possession and in their answer to a

petition for a rule to show cause why they should not be held in contempt of court, filed various motions in the trial court seeking to assert new grounds for challenging the validity of the taking. After the denial of rehearing by the Illinois Supreme Court, the trial court overruled these various petitions and motions. The trial court also granted the school authorities a supplemental order for possession directing the re-eviction of the Schroeders, who had unlawfully reoccupied the property, as aforesaid, while the school was being constructed.

The "Taxpayers' Suit."

At about the same time, in September 1962, the Schroeders, purporting to join with them certain other alleged taxpayers, filed a petition (under Ill. Rev. Stats., 1961, Ch. 113 §44) for leave to file a taxpayers' suit for injunction to prevent construction of the school building on the condemned land, which again sought to challenge the validity of the taking. The circuit court denied leave to file the taxpayers' suit on the ground it was a collateral attack on the judgment entered in the condemnation case.

The Third and Fourth Appeals.

The Schroeders thereupon appealed to the Illinois Supreme Court from the judgment denying leave to file the taxpayers' suit and from the order overruling their various motions in the condemnation suit filed, as above, in their answer to the petition for rule to show cause why they should not be held in contempt, in which they had sought to raise new points challenging the validity of the taking. The Illinois Supreme Court consolidated these appeals (over the objection of the Schroeders) and in May, 1963, affirmed the circuit court. *People ex rel. White* v. *Busenhart*, 29 Ill. 2d 156 (1963).

With reference to the Schroeders' petitions and motions in the condemnation case, the court held that all points therein raised were or could have been raised in the second appeal and therefore were conclusively adjudicated against the Schroeders by the decision on that appeal. (29 Ill. 2d at 159).

With reference to the taxpayers' injunction suit, the Illinois Supreme Court stated that the petitioners therein again sought to raise "the points urged in the eminent domain case." The court held that its judgment in the second appeal in that case was "not subject to collateral attack since the court had jurisdiction of the subject matter and the parties." (29 Ill.2d at 162). Petitioners filed a petition for rehearing which was denied.

The Federal Action.

The Schroeders next filed an action in the United States District Court, in which they again sought to relitigate the question of whether the school district had the right to take the land for school purposes. They asked for a declaratory judgment that the state court judgments and orders in the condemnation case were void; that plaintiffs be declared to be the rightful owners of the condemned property; and that the State of Illinois, the Trustees of Schools, and the School District be enjoined "from exercising any ownership over the premises herein and before described; or interfering with the rights of the plaintiffs as the rightful owners of the premises." (A. 20-21 in Case No. 1248, October Term 1965, in this Court.)

The district court dismissed the action, and the Courts of Appeals for the Seventh Circuit affirmed. Both courts held that the federal courts lack jurisdiction to review collaterally judgments of state courts having jurisdiction over the

person and subject matter, and that the questions sought to be raised had been conclusively adjudicated against petitioners in the condemnation proceeding. *Schroeder* v. *Illinois*, 354 F.2d 561 (7th Cir. 1965). This Court denied certiorari. 384 U.S. 972 (1966).

The Case at Bar.

The complaint in the case at bar was filed shortly before the federal action just described. The fifty defendants included past and present members of the School Board, the School Trustees, and the school administration, the deputy sheriffs who carried out the eviction orders, contractors and sub-contractors hired to build the school; and the utility company which shut off petitioners' electric power after the Court had ordered them evicted as well as others', including even a laborer employed to plow the land to prevent weed growth.

The complaint alleged that the fifty defendants conspired in December, 1961 (which is when petitioners were evicted pursuant to the court order carrying out the condemnation judgment) to take possession of the subject property and thereby destroy the fruit, vegetable, and Christmas tree business petitioners conducted there; and that defendants did so because petitioners were selling their produce at lower prices than their competitors. (A.16-17, 21 in case 947, October Term 1967, in This Court.) No defendant is alleged to be a competitor of petitioners or engaged in the produce business. The overt acts alleged to have been committed by various individual defendants were alleged to have been in furtherance of and pursuant to the supposed conspiracy, and for the sole purpose of achieving the object of the conspiracy.

The Illinois trial court entered summary judgment in favor of all defendants, without prejudice to petitioners' right to assert in separate suits against individual defendants any tort claims charged against any of them. The School defendants (respondents herein) also filed in the trial court, a motion to assess attorneys' fees and costs against plaintiffs under Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1963, Ch. 110, §41), which provided for assessment of such expenses incurred by reason of allegations in a pleading "made without reasonable cause and not in good faith, and found to be untrue." The trial court denied this motion.

The Appellate Court of Illinois, in an appeal brought by the Schroeders, affirmed the summary dismissal of the complaint, holding that petitioners' claim that defendants took possession of their property not for a public purpose but for the purpose of destroying their fruit and vegetable business because they were underselling their competitors could have been raised in the condemnation case and was therefore barred by the judgment in that case. 80 Ill. App.2d 431 (1st Dist. 1967).

Upon defendants' cross appeal, the Appellate Court reversed the trial court's denial of §41 relief and remanded the case to the trial court for hearing to determine the amount of the expenses allowable. The court noted (80 Ill. App.2d 431, 441):

> "We think that the record in this case affords ample justification for a finding that the above allegations of plaintiffs' complaint were untrue, were made without reasonable cause, and were made in bad faith. . . ."

Petitioners then filed a petition for leave to appeal to the Supreme Court of Illinois, which that court denied without

opinion, and then a petition for certiorari to this Court, which was denied. (390 U.S. 947) (1968).

At the proceedings on remand, the respondents amended their original Section 41 motion to claim fees and expenses incurred following the appeal to the Illinois Appellate Court. The trial court, after a hearing, awarded respondents $16,168.46 for fees and expenses incurred in defending the matter in the trial court and at the appellate level in the state courts. Fees were not sought or awarded for successfully resisting certiorari to this Court (*i.e.*, 390 U.S. 947) (1968), or for the costs of any of the proceedings following the remand. The petitioners' appealed to the Illinois Supreme Court, which transferred the case to the Illinois Appellate Court, and the Appellate Court affirmed. (273 N.E.2d 750) (1st Dist. 1971). It is this 1971 Appellate Court decision which petitioners ask this Court to review.

ARGUMENT

I.

No Federal Constitutional Questions are Presented

In the decision which petitioners ask this Court to review, the Appellate Court pointed out that it is a settled matter of Illinois law that attorneys' fees awarded under Section 41 may include fees incurred at the appellate level where the appeal is a needless extension of a baseless lawsuit. *Manchester Ins. & Ind. Co. v. Straw*, 122 Ill.App.2d 183, 190 (2nd Dist. 1970).

Granted the allegations made in bad faith, the imposition of the sanctions of Section 41 does not raise a federal question. Sanctions similar to those of Section 41 are imposed by the federal courts. 6 Moore, *Federal Practice*, ¶54.77[2], at 1352 *et seq.* (2d ed. 1971). *Accord, Bell v. School Board*, 321 F.2d 494, 500 (4th Cir. 1963); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951); *Taussig v. Wellington Fund, Inc.*, 187 F.Supp. 179, 222-23 (D. Del. 1960), *affirmed*, 313 F.2d 474 (3rd Cir. 1963), *cert. denied*, 374 U.S. 806 (1963).

Petitioners complain that the award was made to "an attempted intervenor, who is not a party to the action." The most cursory reading of the trial court judgment shows that this is not the case; the award was made to the individual school defendants who were defendants in the petitioners' original vexatious suit, although the award was made for the use and benefit of the school body which sustained the burden of the legal expenses involved.

Petitioners claim that award was for "multiple attorneys with overlapping and duplicative efforts." Again, the trial court record demonstrates that this is not true. The trial court found that there was no duplication of work on the part of the attorneys representing the respondents, and the Appellate Court specifically noted that there was no showing of any duplication of work. (272 N.E.2d 750, at 754.) Petitioners have never shown wherein there was any duplication of attorney's services. They merely, by conclusion, made the unsupported charge of duplication.

Petitioners argue that the amendment to the Section 41 motion was made in the trial court more than 30 days after the mandate of the Appellate Court had been filed. Petitioners do not suggest the source of the "rule" that a Section 41 motion must be amended within a particular time from the issuance of the mandate.

In any event, as pointed out by the Appellate Court, this objection was not timely raised in the trial court. (272 N.E.2d 750, at 753.) If there were a 30-day rule, that period would run from the date of reinstatement in the trial court, not from the date the mandate issues. (272 N.E.2d 750, at 753.) Further, the Illinois Appellate Court determined that no 30-day rule applies where the case continues, rather than where jurisdiction ceases following a final judgment. (*Ibid.*)

No federal constitutional question is presented by these Illinois procedural rules. *Bailey* v. *Anderson*, 326 U.S. 203, 205 (1945).

II.

There Was No Denial Of Federal Constitutional Rights In Denying A Continuance To The Petitioners

On September 17, 1968, after a number of continuances had been granted to the petitioners, the trial court set the Section 41 hearing for October 15, 1968, the order providing that no further continuances would be granted. Petitioners' counsel who ultimately participated in the Section 41 hearing (Petitioners' third attorney in four months) had been retained "to look into the case" on September 20, 1968, and was retained "to handle the case" on October 13, 1968. On October 15, petitioners moved for another continuance, and the motion was denied.

The denial of the motion for a further continuance was predicated on Illinois Supreme Court Rule 231(f) (Ill. Rev. Stat., 1969, Ch. 110A, §231(f)) which provides that "no motion for a continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay," and upon the Rules of the Circuit Court of Cook County which state that a continuance shall not be granted upon the grounds of substitution of attorneys (Rule 6.1(b)).

It is, of course, only an arbitrary denial which denies due process. As this Court noted in *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964):

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the

> right to defend with counsel an empty formality. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

The circumstances present in the instant case—a fourth request for a continuance by the petitioners' third attorney in four months made on the day an uncomplicated hearing was to begin after the trial court had advised all parties a month earlier that no further continuances would be granted—establish that the denial was not arbitrary.

III.

Petitioners Were Not Denied Federal Constitutional Rights by the "Illinois Court Summary Judgment Procedures".

Finally, in a one-paragraph point, petitioners urge that they were denied constitutional rights by "the summary judgment procedure." It is impossible to determine to what the petitioners have reference. The only summary judgment granted in the litigation was the summary judgment entered by the trial court in 1964, which dismissed the petitioners' complaint and denied respondents' motion for fees and expenses under Section 41. That determination was appealed to the Illinois Appellate Court, which affirmed as to the dismissal of the complaint and reversed as to the denial of the Section 41 motion in the opinion reported at 80 Ill.App.2d 431 (1st Dist. 1967). This Court declined to review by certiorari that decision. 390 U.S. 947 (1968). No summary judgment motion was filed and none granted after the remand in 1968 by the Appellate Court. A full hearing was held at that time by the trial

court to determine the amount of fees and expenses to which respondents were entitled under Section 41.

In any event, the point now urged by petitioners (whatever that point may be) was not raised in the Court below, and it has therefore been waived. See *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955); *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945).

CONCLUSION

This petition for certiorari, which is but the latest episode in petitioners' campaign of unceasing relitigation against the School District, is frivolous and should be denied.

Respectfully submitted.

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